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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. A-681

BERNARD BOLANDER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

I

THE IMPOSITION OF DEATH SENTENCES FOLLOWING AN UNANIMOUS JURY VERDICT RECOMMENDING LIFE SENTENCES CONSTITUTES A DEPRIVATION OF PETITIONER'S LIFE WITHOUT DUE PROCESS AND DEPRIVATION OF HIS RIGHT TO THE EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

II

THE AGGRAVATING CIRCUMSTANCES SET FOPTH IN SECTIONS 921.141(5)(e) AND (g) ARE UNCONSTITUTIONALLY VAGUE AND UNCERTAIN WHEN APPLIED TO THE FACTS OF THIS CASE.

III

THE REFUSAL TO ISSUE COMPULSORY PROCESS TO COMPEL THE ATTENDANCE OF A CO-DEFENDANT TO TESTIFY AS A DEFENSE WITNESS VIOLATED PETITIONER'S RIGHT TO CALL WITNESSES UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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> In all criminal prosecutions, the accused shall enjoy the right. . . to have compulsory process for obtaining witneses in his favor . . .

AMEND. VIII, U.S. CONST.

> Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted.

AMEND. XIV, U.S. CONST.

> . . . Nor shall and State deprive any person of life liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 921.141, Fla.State (1979)

> (5) AGGRAVATING CIRCUMSTANCES. Aggravating circumstances shall be limted to the following:
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> • • •
>
> (a) The capital felony was committed by a person under sentence of imprisonment.
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> • • •
>
> (c) The defendent knowingly created a great risk of death to many persons.
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> • • •
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> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
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> • • •
>
> (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

STATEMENT OF THE CASE

The petitioner was charged by an indictment with four counts of first degree murder, four counts of kidnapping and four counts of armed robbery (A.1-9). Two others, Paul Thompson and Joseph Macker, were also charged with the same offenses. Macker was also charged with possession of cocaine. Pursuant to a plea bargain, Macker plead guilty to four counts of second degree murder. He plead guilty as charged to the remaining counts. He was sentenced to concurrent life terms on the murder, kidnapping and robbery counts and a concurrent fifteen year term on the cocaine charge. He also

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Petitioner, Bernard Bolander, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Florida in this cause, rendered on December 20, 1982.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 422 So.2d 833. The full opinion is included in the appendix to this petition at pages 183-192.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), to review the judgment and opinion of the Supreme Court of Florida, issued on October 28, 1982 and rendered upon the denial of a timely motion for rehearing on December 20, 1982. On February 8, 1983, Mr. Justice Powell issued an order extending the time for filing this petition to March 20, 1983.

agreed to and did become a prosecution witness (A. 11). Thompson, the remaining co-defendant, was effectively severed from the Petitioner when the trial court ruled him to be mentally incompetent to stand trial (A. 183).

Petitioner had served a subpoena on Thompson at the county jail where he was confined in order to have him testify as a defense witness at Petitioner's trial. Pre-trial, Thompson's lawyer moved to quash the subpoena for the reason that since Thompson had a guardian, the guardian would, under Florida law, have to be served. He also stated that he had advised Thompson to invoke his Fifth Amendment privilege if called to testify. The trial court reserved ruling on the motion (A. 186). Petitioner then moved for a continuance. Attached to the motion was an unsigned affidavit for Thompson's signature. It stated that Petitioner was not at the murder scene between 9:00 p.m. , January 7, 1980 and 3:00 a.m., January 8, 1980 (A. 186-187). According to the testimony of Macker, this is when he, Thompson and Petitioner committed the murders (A.11-90).

During the presentation of the Petitioner's case, his attorney moved the court to issue a writ of habeas corpus ad testificandum to secure Thompson's appearance as a defense witness, Thompson still being incarcerated in the county jail at the time. The trial court refused to do so (A. 91-93). Petitioner testified in his own behalf to the effect that he was not present at the murder scene at the time the murders were committed (A. 94-139). Thompson's proffered testimony as contained in the unsigned affidavit would have supported the Petitioner's testimony in this regard.

The facts of the murders themselves are set forth in the opinion of the Florida Supreme Court. Briefly summarized, they show that the three defendants, with the Petitioner playing the most prominent part, tortured, robbed and murdered four armed cocaine dealers and attempted to destroy all incriminating evidence (A. 183-185).

Following a verdict of guilty as charged, the jury heard arguments of counsel but no evidence concerning the penalty (A. 140-157). After deliberating for twelve minutes,

the jury unanimously recommended a life sentence. The trial court then discharged the jury and summarily imposed four death sentences (A. 165-173). The court found all but one of the statutory aggravating circumstances present and none of the mitigating circumstances (A. 174-182). In affirming the judgments and sentences, the Florida Supreme Court agreed that there were no mitigating circumstances but disapproved the trial court's findings as to two aggravating circumstances. (A. 183-192).

REASONS FOR GRANTING THE WRIT

I

THE IMPOSITION OF DEATH SENTENCES FOLLOWING A UNANIMOUS JURY VERDICT RECOMMENDING LIFE SENTENCES CONSTITUTES A DEPRIVATION OF PETITIONER'S LIFE WITHOUT DUE PROCESS AND DEPREVIATION OF HIS RIGHT TO THE EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

The imposition of death sentences, following a unanimous advisory jury verdicts against death, violates both the Due Process clause and the Equal Prtoection clause of the Fourteenth Amendment for the following reasons. First, Florida law permits no degree of finality to a jury's advisory verdict. Second, it allows trial judges to override such advisory verdicts utterly ungoverned by any meaningful standards. Third, by denying any finality to a jury's advisory verdict, Florida law countenances a practice which it specifically bars in civil trail practice.

Following the presentation of argument by counsel only, the trial court charged the jury in pertinent part as follows:

> If you do not find that there existed sufficient of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence of life imprisonment.
>
> Should you find sufficient of these aggravating circumstances exist to, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh th aggravating circumstances found to exist.
>
> * * *
>
> The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law that is given to you by the Court.
>
> Your verdict must be based upon your findings of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which weigh any aggravating circumstances that are found to exist (A. 159,161).

The jury unanimously recommended a life sentence (A.159-161).

The sine qua non of a jury verdict is that it is final as to something. In Bullington v. Missouri, 451 U.S. 430, 445 (1981), this Court stated:

> A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final. The values that underlie this principle...are equally applicable when a jury has rejected the State's claim that the defendant deserves to die... 451 U.S. 445.

Florida law, however, affords no degree of finality to a jury's penalty verdict. A sentencing court may not only disregard the verdict, it may also reject the findings of fact inherent in the verdict. One of two conclusions may be drawn from the jury's verdict here. Either there were no aggravating circumstances shown by the evidence, or there were but they were outweighed by the mitigating circumstances. In the first instance, the verdict means no aggravating circumstances exist; in the second instance, the verdict means mitigating circumstances do exist. But Florida law permits the sentencing court not only to reweigh the evidence, it permits it to examine the evidence de novo and reject the jury's findings of fact. This is exactly what the trial court did. It rejected the verdict and determined that aggravating circumstances was of special importance since the court reversed the trial court's findings on two aggravating circumstances. The court stated:

> In the absence of any mitigating circumstances, disapproval of two aggravating factors does not require reversal of the death sentence. (A 191).

The Florida death penalty statute purports to give a defendant in a capital case the right to a jury trial on sentencing, but in fact gives him nothing of the sort. If a judge may disregard a jury's verdict and the findings of the fact inherent therein, the right to a trial by jury becomes on utter nullity. The right to a trial by jury is the right to have its verdict treated as final as to something. Bullington v. Missouri, supra; Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Limited, 369 U.S. 882 (1962). To give one the form but none of the substance of the right to a trial by jury is an affront to due process.

Florida law not only permits a judge to override a jury's advisory verdict of life imprisonment, it permits a judge to do so pursuant to no meaningful standards. The Florida Supreme Court in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) stated that a judge may impose the death penalty where a jury has recommended a life sentence only if the " . . . facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." The problem with this standard is that by the time the trial judge gets around to imposing the death penalty, reasonable people namely, the jury, have differed.

The problem of the Tedder standard is especially evident in this case. Here, the jury heard no evidence during the penalty phase, only argument of counsel. Petitioner's counsel's remarks fill only two pages of transcript. Yet the entire jury recommended a life sentence after only a few minutes deliberation. No one, least of all the Respondent or the trial court, has suggested that the jury's determination of guilt was unreasonable. If, therefore, the jury which returned verdicts of guilty be deemed sufficiently reasonable people to justify sustaining its findings and verdicts of guilty, then it is a logical impossibility for that identical jury upon identical evidence, to be deemed unreasonable when it rendered its advisory verdict.

By allowing a trial judge to override a jury's recommendation of mercy, Florida contenance a practice utterly foreign to its civil trial practice. In a civil suit for damages, a jury determines liability and, if favorable to the plaintiff, determines the amount of the award. That award may not be set aside and increased by the trial court. If the award is grossly inadequate or excessive, the trial court may order a new trial. However, the court cannot simply raise or lower the award. Robert v. Bushore 182 So.2d 401 (Fla. 1966); Radiant Oil Co. v. Herring, 200 So. 376 (Fla. 1941). Thus, a defendant in a civil wuit for damages may lose before the jury on the issue of liability but prevail on the issue of damages. If he does so, the worst he has to fear is a new trial.

A defendant in a capital case is in a much worse position. He may lose before the jury on the issue of liability, ie, guilt or innocence, but prevail on the issue of penalty. If so, the defendant is faced not with the prospect of a new trial if the

judge disagrees with the jury's sentence verdict, he is faced with the death penalty. Florida, in short, permits a criminal version of additur, something which Florida law does not permit in civil cases. Sarvis v. Folsom 114 So.2d 490 (Fla. 1st DCA 1959). Indeed, this is additur with a vengeance since the defendant in a capital case does not have the option of a new trial. The denial of the equal protection of the law here is manifest.

II

THE AGGRAVATING CIRCUMSTANCES SET FORTH IN SECTIONS 921 . 141 (5) (e) AND (g) ARE UNCONSTITUTIONALLY VAGUE AND UNCERTAIN WHEN APPLIED TO THE FACTS OF THIS CASE.

This Court in Gardner v. Florida, 430 U.S. 349, 358, stated:

> It is of vital importance to the defendant to the community that any decision to impose the death sentence be and appear to be based on reason rather then on caprice or emotion.

And in Godfrey v. Georgia 446 U.S. 420 (1980), this Court stated that if a State provides for capital punishment, the Constitution requires that it impose it by clear and objective standards. These standards must channel the sentencer's discretion in order to make rational review possible and to bar arbitrary and capricious sentencing.

Section 921.141 (5) Fla. Stats., 1979, sets forth eight aggravating circumstances to be considered by the sentencing court in determining if the death penalty should be applied. The trial court here found all but one of these circumstances to be present (A.174 - 179). The Florida Supreme Court disapproved two of the findings but affirmed the death sentence (A. 190-191).

The Florida Supreme Court found that the remaining factors were all supported by evidence. These other factors included the following:

> (5) (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> • • •
>
> (5) (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

Petitioner does not contend that there was no evidence to support the findings of the trial court as to these points. But, the evidence can be rationally interpreted to reach opposite conclusions. This is because the standards are so vague that they do not channel

the sentencer's discretion in the manner prescribed by Godfrey. Put another way, rational people can apply those standards to the facts of this case and come to opposing conclusions. The trial court and the Florida Supreme Court felt that the evidence met the standards set forth in (5) (e) and (5) (g) of the statute. As to (5) (g), the prosecuting attorney came to a different conclusion. In his argument to the jury, he stated:

> The next point says that the crime for which a defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
> That does not apply here, because that is applicable to a different sort of situation than we have in this case.
>
> So I cannot argue that to you, and I will not. (Emphasis added); (A. 147-148).

Both the trial court and the prosecuting attorney believed that death was the appropriate sentence in this case. But both viewed the same evidence and came to contrary conclusions.

As to (5) (e), the prosecuting attoney's argument to the jury was tentative at best. He stated:

> Number five says that the crime for which a defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
> That can be argued, becasue after robbing and kidnapping these people, had he let them go, they would have notified the authorities to come back and get them. They would have been arrested, and he had to kill these people to avoid their capture at a future time (A.147).

Given the forcefulness of his other arguments, this appears to be no more than a statement by the prosecutor that the point is arguable.

Petitioner agrees that the "point can be argued." but believe that rational people can view this same evidence and come to an opposite conclusion. That conclusion was that the murders were committed to prevent the victims from retaliating. Even the Florida Supreme Court conceded that may have been a possible motive. (A.191). Indeed, it seems unlikely that armed cocaine dealers would complain to the police after being robbed of cocaine and cash, since they would have to confess to the commission of a felony.

Given the vagueness and lack of precision of (5) (e) and (5) (g) of the statute, the imposition of the death sentence in this case cannot be the result of a non-capricious and non-arbitrary discretion

as required by the Eighth and Fourteenth Amendments. The death sentences should be set aside.

III

THE REFUSAL TO ISSUE COMPLUSORY PROCESS TO COMPEL THE ATTENDANCE OF A CO-DEFENDANT TO TESTIFY AS A DEFENSE WITNESS VIOLATED PETETIONER'S RIGHT TO CALL WITNESSES UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Sixth Amendment states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .

In Washington v. Texas, 388 U.S. 14 (1967). this Court held that portion of the Sixth Amendment to be applicable in state criminal trials through the due process clause of the Fourteenth Amendment.

Here, the Petitioner sought to call a co-defendant as a reverse alibi witness. That is, Petitioner hoped to show through Thompson that Thompson was present at the scene of the murders during the time the murders occurred but that Petitioner was not. Initially, Petitioner served a subpoena on Thompson at the Dade County, Florida jail where he was being held. Thompson evidently had a guardian and under Florida law. the guardian would have to be served with the subpoena. Thompson's lawyer moved to quash the subpoena on those grounds but the trial court never ruled on it. During the presentation of Petitioner's case, Petitioner sought to compel the attendance of Thompson by means of a writ of habeas corpus ad testificandum. The trial court declined to do so for two reasons. First, Thompson, having been declared incompetent to stand trial, was incompetent to testify. Second, Thompson had been advised by counsel to take the Fifth Amendment if called to testify. The trial court's first reason was simply a misstatement of Florida law. See Florida Power and Light Co. v. Robinson, 68 So.2d 406 (Fla. 1954). The second reason was also wrong in that it presupposes that advice to take the Fifth Amendment in equal to invoking it. Before Thompson could receive the benefit of the privilege, he himself would have to invokd it. Garner v. United States, 424 U.S. 648, 655.

The Florida Supreme Court, however, upheld the trial court on other grounds. The court noted that pre-trial, Petitioner was on notice that his subpoena may have been defective in that it was not served on the correct party. Petitioner then, after the prosecution

rested, sought to secure Thompson's attendance by writ of habeas corpus noted that such a writ is a high prerogative writ. The court went on to hold that there was no abuse of discretion by the trial court in denying the writ since granting it would have disrupted and delayed the trial. Bolander v. State 422 So.26 833, 835-836 (1982).

The Sixth Amendment speaks only in terms of compulsory process. It does not state that the attendance of witnesses must be obtained by subpoena only. The term compulsory process is certainly broad enough to include a writ of habeas corpus ad testificandum as well as a subpoena. Both would compel the attendance of a witness before the trial court. But the Florida Supreme Court took the position that when Petitioner elected to invoke his right to call a witness by means of habeas corpus ad testificandum, his right was reduced to a matter of judicial discretion. As this Court stated in Washington, supra:

> The right to offer the testimony of witnesses, and to compel their attendance if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. 409 U.S. 19.

The exercise of a right so fundamental to due process as the right to call witnesses should not be the subject to the caprice of judical discretion. To allow the right to call witnesses to be so treated simply because a defendant seeks one form of compulsory process rather than another would truly represent the triumph of mindless form over substance.

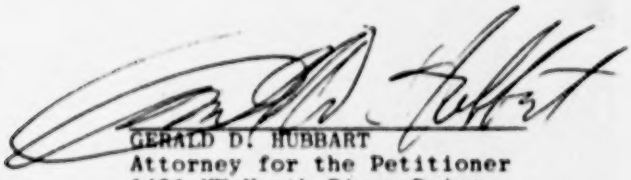
But even if the exercise of the right to call witnesses is treated as a matter of judicial discretion, there was a clear abuse of discretion here. Thompson's proffered testimony would have exonerated Petitioner. His testimony would have been immensely beneficial to the defense. Any delay in the trial which would have been caused by getting him to court would have been minimal. Thompson was at the time being held at the county jail (A. 91). Undersigned counsel represents to this Court, as he did to the Florida Supreme Court, that the county jail and the courthouse where this case was tried are connected by an overhead passageway. Prisoners are brought to

and from court on a daily basis via this passageway. The delay in getting Thompson to the courtroom would have been minimal, certainly no more than an hour. Clearly, there was an abuse of discretion here.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests this Court to issue its Writ of Certiorari to review the decision of the Supreme Court of Florida in this cause.

Respectfully submitted,



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82 6423

Supreme Court of Florida

No. 59,333

BERNARD BOLENDER, Appellant,

v.

STATE OF FLORIDA, Appellee.

[October 28, 1982]

PER CURIAM.

Bernard Bolender appeals his convictions of first-degree murder and the trial court's imposition of multiple death sentences after the jury had recommended life imprisonment. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm both the convictions and sentences.

The state charged Bolender and two codefendants with four counts of first-degree murder, four counts of kidnapping, and four counts of armed robbery for the brutal torture slayings of four alleged drug dealers. Bolender was tried separately because one codefendant, Paul Thompson, had been adjudicated incompetent and the second codefendant, Joseph Macker, pled guilty to reduced charges and became a state witness. Macker received concurrent life sentences on all twelve counts, plus fifteen years on a possession of cocaine charge.

The testimony at trial indicates that on the evening of January 8, 1980 the codefendants were at Macker's residence when two of the victims, John Merino and Rudy Ayan, arrived to participate in a drug deal. An argument erupted and Bolender, armed with a gun, ordered the two to strip. A short while later Thompson entered holding Scott Bennett, another subsequent

victim, at gunpoint. Thompson said he had surprised Bennett lurking in the bushes outside, armed with two guns. Thompson also discovered a kilogram of cocaine on Bennett which the defendants confiscated. Macker testified that at that point he picked up a gun and went outside to see if anyone else was hiding. He saw a car driving back and forth in front of the house and motioned the driver to come inside. The driver would not. Thompson then ordered Merino to get dressed, and the two of them lured the driver, Nicomedes Hernandez, into the house.

The defendants ordered the additional victims to strip and robbed all four of their jewelry. Thompson left to search the car driven by Hernandez and returned with approximately $3,000 in cash and two more guns. At that point Bolender threatened to kill all four if they did not reveal the location of an additional twenty kilograms of cocaine.[1]

Macker testified that during the ensuing hours the victims were tortured and terrorized in an attempt to obtain their cocaine. He stated that Bolender used a hot knife to burn the back of Hernandez. Bolender also kicked the victims and beat them with a baseball bat and even shot Hernandez in the leg in an attempt to make him talk. The victims insisted, however, that they only had one kilogram of cocaine and not the twenty that Bolender wanted. Macker admitted hitting Merino with the baseball bat but denied any further involvement in the beatings, saying that Bolender dominated him and Thompson. Later they wrapped the victims in sheets, rugs, bedspreads, and the material from a beanbag chair. Bolender and Thompson placed them in the blue Monte Carlo Hernandez had been driving. John Merino was still alive at this point; the others were, presumably, dead. Bennett's and Ayan's bodies were placed in the trunk, Merino in the back seat, and Hernandez in the front. At approximately 4:30 a.m. Bolender and Thompson left with the Monte Carlo and

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[1] In the sentencing order the trial court indicated that a kilogram of cocaine was worth $45,000.

Bolender's car and drove onto the I-95 expressway. They parked the car on the side of the expressway a short distance past the entrance ramp. Intending to burn the car and the victims, they poured gasoline on the vehicle and the surrounding grass and set the grass on fire as they left. Burning the car failed, however, because several motorists saw the fire and put it out.

The defendants thoroughly cleaned the Hacker home, removing the bloodied carpeting from the bedroom and living room and scrubbing down the walls. Later, several of the sheets and rugs found wrapped around the bodies were identified as coming from the Hacker home. Bolender's fingerprints were found on the Monte Carlo, and on January 13, 1980 he and Hacker were arrested for the murders. Five days later Hacker gave a statement implicating himself, Bolender, and Thompson. He also told the police where they had disposed of the weapons and other evidence.

The jury convicted Bolender of four counts of first-degree murder, four counts of kidnapping, and four counts of armed robbery. Neither the state nor Bolender presented any evidence at the sentencing hearing. After arguments by counsel, the jury recommended a sentence of life imprisonment. The judge did not accept the jury's recommendation, but, rather, imposed the death sentence upon finding all but one of the statutory aggravating factors to apply.[2] The court found nothing in mitigation.

Bolender alleges that the trial court erred in denying his petition for a writ of habeas corpus ad testificandum to secure the attendance of codefendant Paul Thompson as a witness at trial. He contends that there was no showing Thompson was

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[2] The court found the following circumstances listed in § 921.141(5) applicable: (a) the crime was committed by a person under sentence of imprisonment; (c) the defendant knowingly created a great risk of death to many persons; (d) and (f) the crime was committed during the perpetration of a robbery and kidnapping and was committed for pecuniary gain; (e) and (g) the crime was committed for the purpose of avoiding or preventing a lawful arrest and to disrupt or hinder the lawful exercise of law enforcement; (h) and (i) the crime was especially heinous, atrocious, and cruel and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

incompetent to testify and that there was no effective exercise of Thompson's privilege against self-incrimination.

A writ of habeas corpus ad testificandum is used to secure the attendance of an incarcerated witness at pretrial proceedings or at trial. State ex rel. Deeb v. Fabisinski, 111 Fla. 454, 152 So. 207 (1933); Hodgins v. State, 139 Fla. 226, 190 So. 875 (1939). The issuance of the writ is in the discretion of the trial court. Moody v. State, No. 52,907 (Fla. July 15, 1982); Baker v. State, 47 So.2d 728 (Fla. 1950), and in most instances its use has been superseded by statute. Section 914.001, Florida Statutes (1979), provides that witness subpoenas in criminal cases shall run throughout the state, and section 48.051, Florida Statutes (1979), specifically allows for service of process on state prisoners. Therefore, since habeas corpus is a highly prerogative writ, Frizzell v. State, 238 So.2d 67 (Fla. 1970), petitions for habeas corpus ad testificandum, as other petitions for writs of habeas corpus, should not be granted when the relief sought can be obtained through other legal processes. State ex rel. Singleton v. Walters, 158 So.2d 513 (Fla. 1963).

In the instant case, Bolender served Thompson with a witness subpoena at the facility where Thompson was incarcerated. Thompson's attorney moved to quash the service on the grounds that Thompson had been adjudicated incompetent and a guardian had been appointed. Under section 48.041, Florida Statutes (1979), his guardian should have been served. The court reserved ruling on that motion, but Bolender never sought to serve the proper party or enforce the original subpoena. At the hearing Thompson's attorney also informed the court that his client would invoke his right to remain silent if called at trial.

On April 8, 1980 Bolender filed a motion to sever his trial from Thompson's and to continue his trial until further proceedings on Thompson's competency had been held. He attached to the motion a purported proffer of Thompson's testimony in unsigned affidavit form. The form, prepared by Bolender's attorney, simply stated that Bolender was not present at Hacker's

house between 9:00 p.m., January 7, 1980 and 3:00 a.m., January 8, 1980. The trial court denied the motion[3] and stated to defense counsel:

> I have reviewed the motion that was filed and I recognize what you are trying to do.
>
> I do not feel that it is an appropriate procedure for me to follow to either sever your client from this one or to continue the trial in this case.
>
> As far as I know, Thompson was still incompetent at the time you had discussions with him.
>
> Until such time as I get reports from psychiatric experts that would indicate that he had regained his competency, I have got to go by the presumption at that time, apparently, based upon the judge's earlier order, he was, in fact, incompetent.
>
> Your position is noted and I appreciate it, but I decline to agree.[4]

Furthermore, the trial court noted that Bolender's counsel had conceded that Thompson's attorney had advised Thompson to invoke his privilege against self-incrimination.

On the day of trial Bolender filed a second motion to continue until an adjudication of Thompson's competency to stand trial. The court also denied this motion. During the presentation of his case, Bolender moved the trial court to issue a writ of habeas corpus ad testificandum securing Thompson's presence as a witness. The trial court denied the motion, stating:

> We have been through this on at least three occasions previously, and you have brought before me on prior occasions the lawyer who represents Mr. Thompson who had indicated that his client would take the fifth amendment were he competent to testify.
>
> He is still presently under an order signed by Judge Moeveler that he is not competent and has never been found to be competent until this time.

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[3] Thompson had previously been severed by the state because of his mental condition.

[4] The trial judge based his presumption on a recent adjudication by a federal district court that Thompson was incompetent to stand trial.

> I think that your order to bring him here for that purpose is moot, and I decline to sign it. We have discussed this on at least three occasions previously.

Defense counsel then stated:

> Your Honor, I bring it up to the court because I want to be certain in case this trial should necessitate an appeal, I want the record to be absolutely clear my position is that the competance of Mr. Thompson to testify as a witness, even if it is at issue, I believe that Thompson, even if incompetent, can testify to what he saw or heard on the night of the occasion if he was in Mr. Macker's home.
>
> I believe that the testimony he would give would tend to exculpate Mr. Macker--excuse me, Mr. Bolender from the crimes for which he is charged.
>
> Consequently, I want to make the record absolutely clear I believe my client is denied his right to confrontation of witnesses.

The court replied:

> You earlier provided me with the information you wished to call him and had honestly stated at that motion that you had been advised by Mr. Thompson's counsel were he called, he would be advised not to answer based on his rights under the fifth amendment.
>
> I recognize what you are trying to do today, and I abide by earlier rulings.

Given these facts we find no abuse of discretion by the trial court in denying the writ of habeas corpus ad testificandum. Bolender was on notice from the April 4 hearing that his original subpoena may have been defective, yet he failed to correct the improper service or file for the writ prior to trial. By waiting until the state had rested before seeking the writ, Bolender improperly sought to disrupt and delay the proceedings, and the court properly denied his motion.

Bolender also alleges that the trial court erred in refusing to permit a defense witness, Mrs. Claudia Merino, to be recalled to testify through an interpreter. The witness had no difficulty answering questions on direct examination, but became confused as to certain dates and times when cross-examined by the state. At that time the court indicated that if the Spanish-speaking woman wanted an interpreter one would be provided. She

made no such request and was excused after redirect. The next morning defense counsel sought to recall Mrs. Merino to testify through an interpreter. The trial court denied the motion.

Generally, the decision to allow a witness to testify through an interpreter is within the sound discretion of the trial court. Watson v. State, 190 So.2d 161 (Fla. 1966), cert. denied, 389 U.S. 960 (1967). In the instant case the witness had no problem on direct examination and only a limited problem on cross-examination. Defense counsel had full opportunity to clear up any misunderstandings on redirect and made no objection at that time to the absence of an interpreter. Under these facts the trial court did not abuse its discretion in denying the motion made after the witness had been excused.

Bolender's final arguments are that the trial court erred in overriding the jury's recommendation of life imprisonment and in basing its decision on aggravating circumstances which had no basis in the record or were nonstatutory aggravating circumstances. In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), we held that for a trial court to override an advisory sentence of life imprisonment by a jury "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Bolender contends that the jury's recommendation was reasonable because the victims were armed cocaine dealers who may have been planning to rob the defendants, because Macker received a comparatively light sentence, and because only Macker testified as to who shot, stabbed, and killed the victims.

We have examined the record and arguments of counsel and do not agree with these contentions. That the victims were armed cocaine dealers does not justify a night of robbery, torture, kidnapping, and murder. Two of the victims were unarmed and present at the Macker residence because of a previous agreement with Bolender.

The disparity between Bolender's death sentences and Macker's twelve concurrent life sentences is supported by the

facts. Bolender acted as the leader and organizer in these crimes and inflicted most of the torture leading to the victims' deaths. Bolender used a hot knife to burn Nicomedes Hernandez on the back and inflicted slash wounds on two of the victims. He also shot Hernández in the leg in an effort to make him reveal the location of his cocaine and inflicted the stab wounds and gunshot wounds that led to the victims' deaths. Hacker's role was less significant, and there is no evidence that he participated in the stabbing and shooting of the victims. Jackson v. State, 366 So.2d 752 (Fla. 1978), cert. denied, 444 U.S. 885 (1979); Smith v. State, 365 So.2d 704 (Fla. 1978), cert. denied, 444 U.S. 885 (1979); Meeks v. State, 339 So.2d 186 (Fla. 1976), cert. denied, 439 U.S. 991 (1978). There was sufficient collaborating testimony regarding Bolender's participation in these crimes. Based on the evidence and testimony at trial, we agree with the trial court that virtually no reasonable person could differ on the sentence.

The trial court found all but one aggravating circumstance to apply.[5] We agree, however, that the court erred in applying two of the circumstances. Aggravating circumstance (5)(a) is not applicable because being on probation is not equivalent to being under a sentence of imprisonment at the time of the crime. Ferguson v. State, No. 55,137 (Fla. July 15, 1982); Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964 (1981). Bolender was on probation for two prior crimes. The trial court indicated, however, that although he considered this an aggravating circumstance he did not rely on it solely, basing his decision on all of the applicable factors.

Circumstance (5)(c), knowingly creating a great risk of death to many persons, is also inapposite. While other persons were at the Hacker home during the course of the evening, Bolender never directed his actions toward any of the uninvolved people, and the means by which he inflicted the injuries, the

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[5] § 921.141(5)(b).

gun, knife, and baseball bat, were not used to endanger the lives of those individuals. Lewis v. State, 398 So.2d 432 (Fla. 1981); Williams v. State, 386 So.2d 538 (Fla. 1980).

The court properly applied the remaining factors. The crimes were committed during the perpetration of a robbery and kidnapping and were committed for pecuniary gain. They were committed for the purpose of avoiding or preventing a lawful arrest and to disrupt or hinder the lawful exercise of law enforcement. John Merino was described as a police informant and was still alive when the defendants attempted to burn the vehicle. After committing the robbery, kidnapping, and torture, the defendants murdered the victims partially to prevent their retaliation but also to prevent arrest. Finally, these crimes were especially heinous, atrocious, and cruel and were committed in a cold, calculated, and premeditated manner. Bolender presented no testimony showing any mitigating circumstance, statutory or nonstatutory.[6] In the absence of any mitigating circumstance disapproval of two aggravating factors does not require reversal of the death sentence. Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933 (1981).

Bolender's convictions and sentences are affirmed.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

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[6] The state's deal with Hacker was argued as mitigation; this has been discussed above.

An Appeal from the Circuit Court in and for Dade County,

Richard S. Fuller, Judge - Case No. 80-640A

Gerald D. Hubbart, Miami, Florida,

for Appellant

Jim Smith, Attorney General and Anthony C. Musto, Assistant Attorney General, Miami, Florida,

for Appellee

Supreme Court of Florida

MONDAY, DECEMBER 20, 1982

BERNARD BOLENDER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 59,333

Circuit Court No. 80-640A
(Dade)

Upon consideration of the Motion for Rehearing filed in the above cause by the attorney for appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tonya Carroll
Deputy Clerk

TC
cc: Hon. Richard P. Brinker, Clerk
Hon. Richard S. Fuller, Judge

Gerald Hubbart, Esquire
Anthony C. Musto, Esquire

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IN THE PREME COURT OF THE UNITED ATES

OCTOBER TERM, 1982

NO. A-681

82 6423

BERNARD BOLANDER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Bernard Bolander, by and through undersigned counsel, moves this Court for leave to proceed in forma pauperis in the above-styled cause, pursuant to Rule 46.1 of this Court. Petitioner has been adjudicated indigent and permitted to proceed in forma pauperis by the courts of the State of Florida. The affidavit of the petitioner in support of this motion is attached hereto.

Respectfully submitted,

GERALD D. HUBBART
Attorney for the Petitioner
1481 N.W. North River Drive
Miami, Florida 33125
(305) 324-5724

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. A-681

BERNARD BOLANDER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

NOTICE OF APPEARANCE

The undersigned hereby enters his appearance as counsel for the petititioner Bernard Bolander, in the above-styled cause.

Respectfully submitted,

GERALD D. HUBBART
Attorney for the Petitioner
1481 N.W. North River Drive
Miami, Florida 33125
(305) 324-5724

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. A-681

BERNARD BOLANDER

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, BERNARD BOLANDER, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made below relating to my ability to pay the costs of prosecuting the cause are true.

I am not presently employed and have not been employed for three years preceding the execution of this affidavit.

I have not, within the past twelve months, received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest dividends, or other sources. I do not own any cash or checking or savings account.

I do not own any real estate , stocks, bonds notes, automobiles or other valuable property.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Bernard Bolander
BERNARD BOLANDER

Sworn to and subscribed before me
this 28 day of Jul, 1983

J W Warren
Notary Public
State of Florida at Large

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1986

82-6423

CASE NO. A-681

UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

BERNARD BOLANDER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA
RESPONSE TO PETITION FOR WRIT OF CERTIORATI

JIM SMITH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL

401 N.W. 2ND AVENUE, SUITE 820
MIAMI, FLORIDA 33128
(305) 377-5441

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

I

THE IMPOSITION OF DEATH SENTENCES FOLLOWING A JURY VERDICT RECOMMENDING LIFE SENTENCES DID NOT CONSTITUTE A DEPRIVATION OF PETITIONER'S LIFE WITHOUT DUE PROCESS AND A DEPRIVATION OF HIS RIGHT TO EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

II

THE AGGRAVATING CIRCUMSTANCES SET FORTH IN SECTIONS 921.141(5)(e) AND (g) FLORIDA STATUTES ARE NOT UNCONSTITUTIONALLY VAGUE AND UNCERTAIN WHEN APPLIED TO THE FACTS OF THIS CASE.

III

THE DENIAL OF PETITIONER'S REQUEST TO COMPEL THE ATTENDANCE OF A CO-DEFENDANT TO TESTIFY AS A DEFENSE WITNESS DID NOT VIOLATE PETITIONER'S RIGHT TO CALL WITNESSES UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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TABLE OF CITATIONS

CASES

IN THE

UNITED STATES SUPREME COURT

October Term, 1982

Case No. A-681

==========

BERNARD BOLANDER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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PRELIMINARY STATEMENT

Respondent accepts the portion of the Petition for Writ of Certiorari setting forth the citation to the Opinion Below, Questions Presented, Constitutional Provisions and Statutes Involved, found on page 1-2 of the Petition. In accepting the Questions Presented, Respondent does not accept any assumption of law contained in the point as set forth.

JURISDICTION

Petitioner seeks to invoke jurisdiction pursuant to 28 U.S.C. §1257(3), to review the judgment and opinion of the

Supreme Court of Florida, issued on October 28, 1982 and rendered upon the denial of a timely motion for rehearing on December 20, 1982. Respondent would submit that this Court should not invoke jurisdiction in that Petitioner has failed to demonstrate grounds upon which the jurisdiction of this Court might be invoked.

STATEMENT OF THE CASE

Respondent would direct this Court's attention to the opinion rendered in Bolander v. State, 422 So.2d 833, 834, 835 (Fla. 1982) wherein the Florida Supreme Court in a detailed rendition presented the germane facts applicable to resolution of the issues raised.

REASONS FOR NOT GRANTING THE WRIT

I

THE IMPOSITION OF DEATH SENTENCES FOLLOWING THE JURY'S RECOMMENDATION THAT LIFE SENTENCES BE IMPOSED DOES NOT CONSTITUTE A DEPRIVATION OF PETITIONER'S LIFE WITHOUT DUE PROCESS AND A DEPRIVATION OF HIS RIGHT TO EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

Petitioner asserts that the imposition of the death sentences following the advisory jury recommendation against death violates both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment in that: (1) "Florida Law permits no degree of finality to a jury's advisory verdict"; (2) "It allows trial judges to override such advisory verdicts utterly ungoverned by any meaningful standards"; (3) "By denying any finality to a jury advisory verdict, Florida Law Countenances a practice which it specifically bars in civil trial practice." relying primarily on

this Court's recent decision in Bullington v. Missouri, 451 U.S. 430 (1981). Petitioner argues that Florida's law is flawed in that it affords no degree of finality to the jury's penalty verdict.

Respondent would submit that the issue is not properly before the court and pursuant to Cardinale v. Louisiana, 394 U.S. 437 (1969), relief on this ground should be denied. As observed in Cardinale, supra, ". . .It was very early established that the court will not decide Federal Constitutional Issue raised here for the first time on review of State court decisions. In Crowell v. Randell, (cite omitted), Justice Storey reviewed the earlier cases commencing with Owings v. Norwood's Lessee, (cite omitted), and came to the conclusion that the Judiciary Act of 1789, Chapter 20, Section 25, 1 Stat. 85, vest this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the Appellate Jurisdiction fails." (cite omitted). "The court has consistently refused to decide federal constitutional issue raised here for the first time on review of state court decisions. . ." 394 U.S. at 438.

In the instant case a review of the claims raised before the Florida Supreme Court reflects that Petitioner never challenged the propriety of the jury override in terms of Due Process and Equal Protection under the Fourteenth Amendment. In fact the opinion reflects that Petitioner contended that the "jury's recommendation was reasonable because the victims were armed cocaine dealers who may have been planning to rob the defenadnt, because Macker received a comparatively light sentence, and because Macker testified as to who shot, stabbed, and killed the victims." 422 So.2d at 837.

Clearly said claim has been raised for the first time in Petitioner' Petition for Writ of Certiorari.

II

THE AGGRAVATING CIRCUMSTANCE SET FORTH IN SECTIONS 921.141(5)(e) AND (g) FLORIDA STATUTES ARE NOT UNCONSTITUTIONALLY VAGUE AND UNCERTAIN WHEN APPLIED TO THE FACTS OF THIS CASE.

Petitioner's second point on appeal suffers the same infirmity as his first, that is, that said claim challenging the vagueness of Section 921.141(5)(e) and (g) Florida Statutes has been raised for the first time in the instant petition. Pursuant to Cardinale v. Louisiana, supra, said claim is not properly before the court.

While Petitioner argued on direct appeal that the aforementioned circumstances were not supported by evidence and proven beyond a reasonable doubt, Petitioner did not argue that said statutory aggravating circumstances were so vague as to deny Petitioner's his constitutional right to defend against said circumstances.

III

THE DENIAL OF PETITIONER'S REQUEST TO COMPEL THE ATTENDANCE OF A CO-DEFENDANT TO TESTIFY AS A DEFENSE WITNESS DID NOT VIOLATE PETITIONER'S RIGHT TO CALL WITNESSES UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner's last point raises the only claim which was specifically argued to the Florida Supreme Court on direct appeal. The court in reviewing this issue concluded:

> "Given these facts we find no abuse of discretion by the trial court in denying the Writ of Habeas Corpus ad testificandum. Bolander was no notice from the April 8th hearing that his original subpoena may have been defective, yet he failed to correct the improper service or file for the writ prior to trial. By waiting until the State had rested before seeking the writ, Bolander improperly sought to disrupt and delay the proceedings, and the court properly denied his motion."
>
> Bolander v. State, 422 So.2d at 836.

The record as set out by the Florida Supreme Court in its opinion reflects that Petitioner was first of all not entitled to a Writ of Habeas Corpus ad testificandum in that under Florida Law there is some question as to whether the trial court had authority to issue said writ, See State ex rel. Deeb v. Fabisinski, 152 So. 207 (1933), in that Florida Statutes Section 914.001 provides that witness subpoenas in criminal cases shall run throughout the state and Florida Statutes Section 48.051 speifically allows for service of process on State's prisoners. A defendant who seeks to have a State prisoner testify on his behalf can simply subpoena that prisoner.

Although it appears that Appellant did attempt to serve the witness with a subpoena, said witness had been previously adjudgedincompetent and had not been found to have regained his competency. Under such circumstances, it was necessary to serve a witness' guardian, Florida Statutes 48.041. This was not done in the instant case. Petitioner's effort to utilize the subpoena process was ineffective in this case because he made no further effort to subpoena a witness' guardian but rather waited "until the State had rested before seeking the writ", in attempt to disrupt and delay the proceeding. 422 So.2d at 836. See Whitefield v. State, 188 So. 361 (1939).

Respondent would submit Petitioner has failed to demonstrate that the actions of the trial court in denying Petitioner's Writ of Habeas Corpus ad testificandum equates to a denial of compulsory process to call witnesses under the Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the numerous reasons cited above, Respondent would respectfully submit that the Petition for Writ of Certiorari filed in this Court be DENIED.

Respectfully submitted

JIM SMITH
Attorney General

BY: _____
CAROLYN M. SNURKOWSKI
Assistant Attorney General

Department of Legal Affairs
401 N.W. 2nd Avenue
Suite 820
Miami, Florida 33128
(305) 377-5441

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail to GERALD D. HUBBART, Attorney for the Petitioner, 1481 N.W. North River Drive, Miami, Florida 33125, on this _____ day of April, 1983.

_____
CAROLYN M. SNURKOWSKI
Assistant Attorney General